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Supreme Court of the United States

OCTOBER TERM, 1957.

No. 446

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Petitioner,

versus

T. L. JAMES & CO., INC., ET AL.,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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MISSISSIPPI VALLEY BARGE LINE COMPANY,
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versus

T. L. JAMES & CO., INC., ET AL.,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Mississippi Valley Barge Line Company (hereinafter referred to simply as "Valley") prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit, one affirming an interlocutory decree in admiralty and the other a final decree in a Civil Action at law, rendered by the United States District Court for the Eastern District of Louisiana, in two closely related cases.

OPINIONS BELOW

The opinion of the Court of Appeals which disposed of both cases is reported at 244 F. 2d 263 and is printed *infra* Appendix p. 29 *ff.* The opinion of the District Court, which likewise disposed of both cases, is reported

at 144 F. Supp. 662 and is printed *infra* Appendix p. 38 *ff.*[1].

JURISDICTION

The judgments of the Court of Appeals for the Fifth Circuit were entered on May 3, 1957,[2] and copies thereof are printed *infra* Appendix respectively pp. 49 and 50. Thereafter petitioner presented to the Court of Appeals petition for rehearings which were denied without further opinion on June 25, 1957.

Jurisdiction of this Court is invoked in both cases under 28 U.S.C. 1254, Act of June 25, 1948, c. 646, 62 Stat. 928.

Jurisdiction of the United States District Court for the Eastern District of Louisiana in the Admiralty Action lay under 28 U.S.C. 1333(1), Act of June 25, 1948, c. 646, 62 Stat. 931, amended May 24, 1949, c. 139, § 79, 63 Stat. 101. Jurisdiction of the United States District Court for the Eastern District of Louisiana in the Civil Action lay under 28 U.S.C. 1331, Act of June 25, 1948, c. 646, 62 Stat. 930.

THE QUESTIONS PRESENTED FOR REVIEW

This petition presents only the following questions of law:

I.

An interstate common carrier by water is so certificated by the Interstate Commerce Commission under

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[1] *The Record* here consists of a two volume record in the Admiralty Action which is complete in all respects and includes the testimony taken in the District Court in both the Admiralty Case and Civil Action which were tried there together; also of a one volume record in the Civil Action complete except for the testimony taken in the District Court. All references herein to the Record are to the paging of the two volume Record in the Admiralty Action.

[2] R. 389.

and is subject to the regulation of Part III of the Interstate Commerce Act for the transportation of shipments on non-self-propelled barges with the use of towboats. This carrier files with the Commission a tariff in which it publishes three rates for such transportation: under the two highest rates it furnishes the towboat and the barge and under the lowest rate it furnishes the towboat and the shipper furnishes the barge. Where the shipper chooses the lowest rate and furnishes the barge and loads the cargo therein, and the carrier furnishes the towboat and performs the transportation, is the transportation of this cargo towage (as held by the Court of Appeals in the cases at bar) or is such transportation affreightment, as held by Your Honors in *Sacramento Navigation Company v. Salz*, 273 U.S. 326, 47 S. Ct. 368, so that the carrier is entitled to the benefit of Section 3 of the Harter Act?[3]

II.

The tariff filed by the carrier with the Interstate Commerce Commission (as hereinabove stated under I) contains certain clauses fixing the liability of the carrier, dependent on the rate charged for the transportation. Do the courts have jurisdiction to declare such provisions invalid (as the Court of Appeals has undertaken to do in the cases at bar) or is such jurisdiction vested in the first instance in the Interstate Commerce Commission as Your Honors held in *United States v. Western Pacific Railroad Company*, 352 U.S. 59, 77 S. Ct. 161?

STATUTES INVOLVED

Section 3 of the Harter Act, 46 U.S.C. 192, being Act of February 13, 1893, c. 105, § 3, 27 Stat. 445;

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[3] 46 U.S.C. 192, reproduced in Appendix, *infra* p. 54.

Section 4 of the Harter Act, being 46 U.S.C. 193, Act of February 13, 1893, c. 105, § 4, 27 Stat. 445;

The Interstate Commerce Act, and particularly

National Transportation Policy, September 18, 1940, being 49 U.S.C., preceding Sections 1, 301, 901, and 1001;

Section 1 of Part I of the Interstate Commerce Act, being 49 U.S.C. 1(4), Act of June 18, 1910, § 7, c. 309, 36 Stat. 545, as amended February 28, 1920, c. 91, § 400, 41 Stat. 474; September 18, 1940, c. 722, Title I, § 2(c), 54 Stat. 899;

Section 15 of Part I of the Interstate Commerce Act, being 49 U.S.C., Section 15(13), Act of February 4, 1887, c. 104, Section 15, 24 Stat. 384, as added June 29, 1906, c. 3591, § 4, 34 Stat. 590; as amended June 18, 1910, c. 309, § 12, 36 Stat. 553-554; February 28, 1920, c. 91, § 421, 41 Stat. 488; March 4, 1927, c. 510, § 2, 44 Stat. 1447; August 9, 1935, c. 498, § 1, 49 Stat. 543; September 18, 1940, c. 722, Title I, Section 10(a-d), 54 Stat. 911, 912;

Section 20(11) of Part I of the Interstate Commerce Act, being 49 U.S.C. 20 (11), Act of February 4, 1887, c. 104, Pt. I, § 20, 24 Stat. 386; June 29, 1906, c. 3591, § 7, 34 Stat. 593; Mar. 4, 1915, c. 176, § 1; 38 Stat. 1196; Aug. 9, 1916, c. 301, 39 Stat. 441; Feb. 28, 1920, c. 91, §§ 436-438, 41 Stat. 494; July 3, 1926, c. 761, 44 Stat. 835; Mar. 4, 1927, c. 510, § 3, 44 Stat. 1448; Apr. 23, 1930, c. 208, 46 Stat. 251; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 13(b), 54 Stat. 919;

Section 216 of Part II of the Interstate Commerce Act, being 49 U.S.C. 316(c), Act of February 4, 1887, c. 104, Part II, § 216, as added August 9, 1935, c. 498, 49 Stat. 558, and amended June 29, 1938, c. 811, § 16, 52 Stat. 1240; September 18, 1940, c. 722, Title I, § 22(b-d), 54 Stat. 924;

Section 225 of Part II of the Interstate Commerce Act, being 49 U.S.C., § 324(a), Act of February 4, 1887, c. 104, Part II, § 225, as added September 18, 1940, c. 722, Title I, § 26(a), 54 Stat. 928;

Section 302(e) of Part III of the Interstate Commerce Act, being 49 U.S.C., Section 902, Act of February 4, 1887, c. 104, Part III, § 302, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat. 929;

Section 305 of Part III of the Interstate Commerce Act, being 49 U.S.C. 905(b), Act of February 4, 1887, c. 104, Part III, § 305, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat. 934;

Sections 306(a) and 306(c) of Part III of the Interstate Commerce Act, being 49 U.S.C. Section 906, Act of February 4, 1887, c. 104, Part III, § 306, as added September 18, 1940, c. 722, Title II, § 201, 54 Stat 935;

Section 314 of Part III of the Interstate Commerce Act, being 49 U.S.C. 914, Act of February 4, 1887, c. 104, Part III, Section 314, as added September 18, 1940, c. 722, Title II, Section 201, 54 Stat. 945;

Section 415 of Part IV of the Interstate Commerce Act, being 49 U.S.C., Section 1015, Act of February 4, 1887, c. 104, Part IV, § 415, as added May 16, 1942, c. 318, § 1, 56 Stat. 296.

STATEMENT

Valley is a common carrier by water and so certificated by the Interstate Commerce Commission. The pertinent provisions of this certificate[4] authorize Valley, as a common carrier in interstate commerce, to transport cargoes by non-self-propelled vessels with the use of separate towing vessels and to engage in general towage between certain points, "subject, however, to such terms, conditions, and limitations as are now, or hereafter may be attached to the exercise of such authority from this Commission". Its certificate is conditioned "upon compliance by said carrier with the requirements of the Interstate Commerce Act, and the orders, rules and regulations of the Commission thereunder".

Valley filed its tariff with the Interstate Commerce Commission and this tariff was in full force and effect at all times pertinent hereto. In this tariff[5] Valley published rules, regulations and rates for the towage of empty barges only, but published no rules, regulations or rates for the towage of barges with cargo thereon. In the same tariff Valley published rules, regulations and rates for the transportation of cargoes, the movement of which was regulated under Part III of the Interstate Commerce Act. For this transportation Valley published three sets of rates in which, generally speaking, the differences are these:

Under the highest rate, denominated as "A" rate, Valley provided the barge on which the cargo is laden and the towboat to move the barge, and waived certain exemptions from liability for loss of and damage to cargo

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[4] Reproduced verbatim in the Appendix *infra* p. 53.

[5] Mississippi Valley Barge Line Company Freight Tariff 25-C, I.C.C. 101, Exhibit Valley 7, sent to this Court in the original and pertinent provisions printed in Appendix, *infra* p. 65 *ff.*

granted by law to carriers of cargo by water, such as the benefit of Section 3 of the Harter Act, and assumed certain liabilities, such as the liability for flood damage. Speaking generally, Valley's liability for loss of and damage to cargo moved under an "A" rate closely approximated the liability of a common carrier by railroad.

Under a rate denominated as "B" rate, which was substantially lower than the "A" rate, Valley undertook to carry cargoes in its own barges with towboats furnished by it, but, generally speaking, reserved to itself all of the exemptions and exoneration from and limitation of liability for loss of and damage to cargo which the law confers upon a common carrier by water.

Under a rate denominated as "C" rate, the lowest of these three rates, and substantially lower than the "A" and "B" rates, Valley undertook to carry cargoes loaded by the shipper on barges owned or supplied by the shipper. Valley furnished only the towboat, and the movement of the cargo was comparable to that afforded by a common carrier railroad which furnishes a locomotive and moves shipments in cars owned or supplied by the shipper. For the transportation of cargoes on barges supplied by the shipper, only the "C" rate applied.

T. L. James & Co., Inc., a general contractor, (hereinafter referred to as "James") requested Valley's Houston, Texas office to quote a rate for the transportation of a cargo of contractors' equipment, including some drag lines and a bulldozer, to be loaded on a barge supplied by James, from New Orleans, Louisiana, to Cheatham Dam, Tennessee, thence to return the barge light to New Orleans. This was a route over which Valley was certificated to operate and an affreightment movement cov-

ered by its Interstate Commerce Commission tariff at the "C" rate therein provided, but Valley's tariff did not provide for such a movement as a towage movement. Thereafter Valley quoted James the "C" rate for this movement, being, as stated, the only rate provided by Valley's tariff.

This rate was accepted by James' representative. James supplied the Barge LA BELLE[6] and loaded thereon the cargo of contractors' equipment at Krotz Springs, Louisiana, on the Atchafalaya River, off-line for Valley, as it is not certificated to operate there. The LA BELLE was transported to New Orleans by a carrier procured by James, and was at New Orleans delivered to Valley, which incorporated the LA BELLE in a northbound tow and departed New Orleans bound for Cheatham Dam, Tennessee. En route the Barge LA BELLE careened, dumped its cargo and then sank in the Mississippi River. Both barge and cargo were recovered.

For the cargo of contractors' equipment, Valley issued its bill of lading in the form prescribed by its Interstate Commerce Commission tariff, but because the estimated weight of that cargo had not been received by Valley prior to the departure of the barge, the bill of lading was not issued until after the barge had sunk. The bill of lading was sent to the shipper, James, which retained it.

Payment of Valley's carrier charges computed in accordance with its I.C.C. tariff was declined by the shipper and Valley brought a Civil Action at law in the United States District Court for the Eastern District of Louisiana, New Orleans Division, against T. L. James & Co.,

[6] Owned by third party and under bareboat charter to James.

Inc. for these carrier charges and the federal transportation tax thereon. Subsequently, T. L. James & Co., Inc. and Brown & Root, Inc., also in the contracting business, alleging the two companies together were engaged in business in a joint venture under the name of Louisiana Bridge Company and were the owners of the cargo laden on the LA BELLE, brought an Admiralty Action in the United States District Court for the Eastern District of Louisiana, New Orleans Division, against Valley for damage to the cargo of contractors' equipment. In the same Admiralty Action James claimed damages for the sinking and for the damage sustained by the Barge LA BELLE, claiming that it was the bareboat charterer and bailee thereof.[7]

Trying the Civil Action and the Admiralty Action together, the District Court held that the movement of the contractor's equipment on the LA BELLE was towage and not affreightment so that Section 3 of the Harter Act was not applicable; and that Valley had been guilty of negligent towage and was, therefore, liable for the damage both to the Barge LA BELLE and to the cargo of contractors' equipment thereon. The District Court held alternatively that if the movement be affreightment, both the shipper's barge and the contractors' equipment laden thereon constituted "cargo"[8] so that a

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[7] Valley filed a cross-libel against James for reimbursement of any amount for which it might be held liable if the Court found the LA BELLE unseaworthy when delivered to Valley, alleging that that would constitute a breach of the warranty assumed by James under the provisions of Valley's tariff, but because the District Court found the LA BELLE "in all respects trim and apparently seaworthy" (R. 367, see Appendix *infra* p. 40) when delivered to Valley and no contrary finding was made by the Court of Appeals, we accept this finding of seaworthiness and make no further mention of this point.

[8] This disregards the fact that the bill of lading issued by Valley was for the contractors' equipment only, and that the barge, being the vehicle on which the cargo was laden, did not constitute "cargo". See *The Lehigh* (D.C.W.D. N.Y., 1935), 12 F. Supp. 75; *The Vale Royal* (D.C. D.Md., 1943), 51 F. Supp. 412, hereinafter discussed, pp. 18-19.

failure to sound bilges and to keep the barge pumped out was improper care and custody of "cargo", and Valley was liable as a carrier for failure in care and custody of the cargo. With regard to the Civil Action the District Court held further that to allow Valley to recover its transportation charges and the federal transportation tax thereon in the Civil Action would simply increase correspondingly James' damages, so the Court would not determine whether or not Valley was entitled to recover the transportation charges and the tax. In the Admiralty Action the District Court entered an interlocutory decree[9] of liability with a provision for determining libellant's damages, and in the Civil Action the District Court entered a final decree[10] dismissing the complaint. From both the interlocutory and final decrees Valley appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed, on the sole ground "that the movement was one of towage"[11] so that it refrained from expressing a definite opinion on the alternative ground found by the District Judge that Valley was not entitled to exoneration under Section 3 of the Harter Act because the barge as well as the cargo laden thereon constituted cargo.

REASONS FOR GRANTING THE WRITS

Your Honors should grant writs of certiorari in these cases for two reasons: (I) To settle the application *vel non* of *Sacramento Navigation Company v. Salz* to the transportation by Interstate Commerce Commission certificated common carriers of cargoes on non-self-propelled barges not owned by the carriers with the use of tow-

[9] R. 378.

[10] Record in the Civil Action p. 19.

[11] R. 400.

boats owned and operated by the carriers, and the application of Section 3 of the Harter Act to such transportation. We submit that the judgment of the Court of Appeals for the Fifth Circuit holding in the cases at bar that such transportation of cargo is towage is both incorrect and in conflict with the jurisprudence in the Second Circuit *In Re O'Donnell* (2 C.C.A., 1928) 26 F. 2d 334, and *The Lehigh* (D.C. W.D. N.Y., 1935) 12 F. Supp. 75, and in the Fourth Circuit in *The Vale Royal* (D.C.D. Md., 1943) 51 F. Supp. 412, holding that such transportation is affreightment and specifically rejecting as the determining test of affreightment or towage the common ownership of the towboat and the barge whereon the cargo is laden. (II) To settle the question whether the courts have the jurisdiction which they have assumed in the cases at bar to declare invalid provisions of an Interstate Commerce Commission tariff fixing the liability of the carriers for loss of and damage to cargoes depending upon the shipper's choice of different transportation rates. This, we submit, conflicts with the rule pronounced by Your Honors in *United States v. Western Pacific Railroad Company*, 352 U.S. 59, 77 S. Ct. 161, that such jurisdiction lies solely in the Interstate Commerce Commission.

I.

We submit that in holding that the transportation of the cargo of contractors' equipment on the Barge LA BELLE constituted towage, grievous error has been committed. Not only is this holding erroneous, but the result thereof has been to unsettle the entire inland water carrier industry in the Mississippi Valley and the Gulf Intracoastal Waterway, which almost uniformly over a period of years has been and still is transporting cargoes

regulated by Part III of the Interstate Commerce Act on barges not owned by the carriers with the use of towing vessels owned or operated by the carriers, on the theory that such transportation constitutes affreightment. This has been done in reliance on the provisions of Section 314 of Part III of the Interstate Commerce Act[12] which permit a shipper to furnish instrumentalities used in the transportation of cargo. In *Sacramento Navigation Company v. Salz, supra,*[13] and in decisions of an Appellate Court of the United States and the District Courts of the United States hereinafter referred to such cargo movements were characterized as affreightment and the carrier afforded the benefit of Section 3 of the Harter Act. This, we submit, is the correct and proper characterization of such cargo movements.

What is it that the shipper sought to accomplish here? The shipper sought to accomplish the transportation of a cargo of contractors' equipment from New Orleans to Cheatham Dam, Tennessee, because it proposed using that equipment on a job there. Incidental to such transportation it was, of course, necessary to move the Barge LA BELLE, loaded, from New Orleans to Cheatham Dam and after its discharge there, to return the empty barge to New Orleans, but that was only incidental. The Barge LA BELLE was already at New Orleans and the round-trip of the barge from New Orleans to Cheatham Dam and return would have been purposeless, except for the need of transporting the cargo from New Orleans to Cheatham Dam.

In *Sacramento Navigation Company v. Salz, supra,* Your Honors held that the movement of cargo on a barge

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[12] 49 U.S.C. 914, reproduced in the Appendix *infra* p. 64.
[13] 273 U.S. 326, 47 S. Ct. 368.

towed by a tug or towboat is affreightment and not towage, notwithstanding the fact that the towing vessel performs towage service to the barge, saying that while towage service is the employment of one vessel to expedite the voyage of another, there, as here, the contract actually made with the shipper "was not to tow a vessel, but to transport goods and plainly that contract was a contract of affreightment".[14] However, in *Sacramento Navigation Company v. Salz* the towing vessel and the barge whereon the cargo was laden wer commonly owned, and that, says the Court of Appeals, differentiates that case from the cases at bar, for here the towboat was owned by Valley and the barge was supplied by James and not owned by Valley. The movement of a barge not owned by the carrier, with or without cargo laden thereon and regardless of the purpose for which the movement be performed, says the Court of Appeals, constitutes towage. That is the real basis of the Court of Appeals' holding in this case: the movement of both the Barge LA BELLE and the cargo laden thereon constituted towage and not affreightment. We submit that this is a wholly incorrect differentiation, for the reason that it adopts as the test of towage as distinguished from affreightment of cargo the ownership of the barge whereon the cargo is laden rather than the character or purpose of the service performed by the carrier. We submit that the only logical and correct test is the purpose of the service performed by the carrier, regardless of the ownership of the barge whereon the cargo is laden.

The illogical test adopted by the Court of Appeals that the ownership of the barge determines whether the movement by the carrier is affreightment or towage, is

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[14] For your Honors' ready reference, the pertinent portion of the opinion in *Sacramento Navigation Company v. Salz* is reproduced in the Appendix *infra* p. 51 *ff.*

certainly not contemplated by Part III of the Interstate Commerce Act; in fact that Act in Section 314 of Part III[15] distinctly provides that a shipper may furnish an instrumentality which, of course, includes a barge, to be used by the carrier in performing the carriage or affreightment.[16] In this connection the illogic of making the ownership of the cargo-carrying vehicle the test rather than the service performed by the carrier appears when consideration is given to other types of transportation. Not only does Part III of the Interstate Commerce Act regulating water carriers permit shippers to furnish an instrumentality used by the carrier in the service, but similar provisions are found in Part I regulating rail carriers,[17] Part II regulating motor carriers[18] and Part IV regulating freight forwarders.[19] For years common carriers by railroad have been using refrigerator cars, tank cars and cars specially equipped for the transportation of acids supplied or procured by shippers, yet there has never been any suggestion that the lack of ownership of the cargo-carrying vehicle by the rail carriers makes the transportation of freight therein anything other than common carriage affreightment or the obligation of the carrier to such freight anything other than the obligation of a common carrier by rail.

Accordingly, what is it about water transportation which converts a movement which would be affreight-

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[15] 49 U.S.C. 914, reproduced in the Appendix *infra* p. 64.

[16] The requirement of Section 314 that charges and allowances for the use of a shipper's instrumentality must be fixed by the Interstate Commerce Commission, in this case is supplied by the differential between the low "C" Rate applicable where the shipper furnishes the barge and the higher "A" and "B" Rates where the carrier furnishes the barge.

[17] 49 U.S.C., Section 15(13), reproduced in the Appendix *infra* p. 57.

[18] 49 U.S.C., Section 324(a), reproduced in the Appendix *infra* p. 60.

[19] 49 U.S.C., Section 1015, reproduced in the Appendix *infra* p. 65.

ment when performed by any other type of carrier, into towage when it is performed by a carrier by water? The National Transportation Policy, as declared by Congress, includes a declaration that it is the policy to the greatest extent possible of equalizing all modes of transportation—water, rail and motor carrier.[20]

Part I of the Interstate Commerce Act requires common carrier railroads subject thereto to establish reasonable through rates with common carriers by water subject to Part III and just and reasonable rates, fares, charges and classifications applicable thereto.[21] Part II of the Interstate Commerce Act makes a similar requirement as to motor carriers subject thereto,[22] and Part III of the Interstate Commerce Act makes a similar requirement with regard to water carriers with relation to both rail and motor carriers.[23] What effect will this artificial distinction of the Court of Appeals have on such joint through movements? Take a typical example: a shipment of grain delivered to Union Pacific Railroad at some inland point in the midwest for through movement by rail and water to Galveston, Texas, for export. The shipment is delivered to the rail carrier at the inland shipping point and a through bill of lading from shipping point to Galveston is issued by the initial carrier, the railroad, with a through export rate, in accordance with joint tariffs of the rail and water carriers on file with the Interstate Commerce Commission. Loaded by the railroad into a box car and transported to a Mississippi River point, the movement is affreightment, regardless of ownership of the box car; it makes no difference whether the car be owned by the carrier supplying the

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[20] 49 U.S.C. preceding Sections 1, 301, 901 and 1001, reproduced in the Appendix, *infra* p. 55.

[21] 49 U.S.C. 1(4), reproduced in the Appendix *infra* p. 56.

[22] 49 U.S.C. 316(c), reproduced in the Appendix *infra* p. 60.

[23] 49 U.S.C. 905(b), reproduced in the Appendix infra p. 62.

locomotive and the right of way or whether the box car be owned by another line of railroad. At the River point the grain is discharged into a barge for transportation south to New Orleans by Valley. Under the ruling of the Court of Appeals whether that movement be affreightment or towage depends upon whether or not Valley owns the barge. Assuming Valley does own the barge, the movement is one of affreightment, but when the barge reaches New Orleans, which is the southern terminus of Valley's certificated operation, and is delivered to an on-carrier for transportation through the Intracoastal Waterway to Galveston, the movement then becomes towage under the test laid down by the Court of Appeals, because the on-carrier does not own the barge. If, on the other hand, the cargo fortuitously be loaded at the River point into a barge owned by the canal carrier, then Valley's movement instead of being carriage is towage, and when Valley delivers the barge with the grain laden thereon to the canal carrier, which owns the barge, the movement is immediately converted from towage to carriage.

Section 20(11) of Part I of the Interstate Commerce Act[24] with respect to liability of initial and delivering carriers for loss of and damage to shipments contains a proviso that "if the loss, damage, or injury occurs while the property is in the custody of a carrier by water, the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water * * * ". Certainly in enacting this provision Congress did not contemplate that the liability of the water carrier,

[24] 49 U.S.C. 20 (11), the pertinent portion of which is reproduced in the Appendix *infra* p. 58.

whether the initial, intermediate or delivering carrier, would be that of a tower whereby the water carrier would be deprived of the benefit of Section 3 of the Harter Act, thereby enlarging the liability of the rail carrier which participated in the through movement.

It will be amply apparent to Your Honors what utter confusion and chaos would result in the application of the test established by the Court of Appeals—confusion in the issuance of bills of lading, confusion in the tariffs, and confusion in the insurances which the barge lines will have to carry, depending, purely fortuitously, on the ownership of the available barge.

The Federal Courts outside the Fifth Circuit have not had the same difficulty in dealing with the transportation of cargoes on barges not owned by the carrier. These courts have uniformly held, following *Sacramento Navigation Company v. Salz*, *supra*, that where the purpose of the movement is actually to secure transportation of the cargo, the movement is not towage, but affreightment. The United States Circuit Court of Appeals for the Second Circuit specifically rejected the test of ownership of the barge in the well considered case of *In Re O'Donnell* (C.C.A. 2, 1928) 26 F. 2d 334. There was involved there the transportation of cargo on a barge towed by a tug of different ownership, with the respective owners of the tug and the barge sharing the earnings of the voyage. The Court held, citing *Sacramento Navigation Company v. Salz*, that the movement of the cargo was affreightment and not towage and that the tug owner and the tug were entitled to the benefit of the exoneration of Section 3 of the Harter Act for cargo loss. Not only did the Second Circuit reject the test of common ownership of the tug and barge, but also held that a partnership *stricti juris* between the owner of the tug and the barge

to accomplish the transportation of the cargo was not necessary to constitute such transportation affreightment subject to Section 3 of the Harter Act.

Two District Courts have extended the doctrine of *Sacramento Navigation Company-Salz* as interpreted in *In Re O'Donnell, supra*, to situations where the tug and the cargo-carrying barge were not commonly owned and in which there was no question of joint venture or partnership between the respective owners of the tug and the barge. In *The Lehigh* (D.C. W.D. N.Y., 1935) 12 F. Supp. 75, the Tug LEHIGH, with barges in tow in tandem formation, anchored in an improper position in a ship channel, as a result of which a vessel collided with one of the barges in its tow. The colliding vessel was libelled by the barge owner and by the owner of cargo laden thereon, and the owner and claimant of the colliding vessel impleaded the tug and the barge whereon the cargo had been laden. The Court held the tug and the barge both solely at fault for the collision but exonerated both the tug and the barge from liability for cargo damage saying:[25]

> "As above indicated, the Ballenas [the tug] and Loretta [the barge] were brought in by petition under Admiralty Rule 56, and it is the duty of the court to settle the entire controversy. Both the Ballenas and the Loretta were seaworthy, properly manned, equipped, and supplied at the beginning of the voyage, and the collision and sinking of the Loretta was due to errors in navigation and in the management of the tug and barge. The tug and tow constitute a single carrier within the meaning of section 3, c. 105, of the Act of February 13, 1893 (46 U.S.C.A. § 192) and neither vessel can be held for loss of the cargo [*In*

[25] 12 F. Supp. 83.

re O'Donnell (C.C.A.) 26 F. 2d 334], and the suit of the Grasselli Chemical Company must be dismissed."

Again, in *The Vale Royal* (D.C.D. Md., 1943), 51 F. Supp. 412, the Court reached the same result. There a barge laden with cargo was stranded by a tug of a different ownership than the barge, and both the barge owner and the owner of cargo laden on the barge libelled the tug for their respective damages. The Court held that the stranding had occurred through the mutual fault of the tug and the barge. It held the tug liable to the barge owner for half damages to the barge, but dismissed the claim of the cargo owner for cargo damage on the ground that the tug and the barge, though not commonly owned, constituted one vessel within the meaning and intendment of the Harter Act, saying:[26]

> "Therefore, the only question remaining to be determined is whether the two vessels, the tug and the barge, constitute the 'vessel transporting merchandise or property' within Section 3 of the Harter Act, 46 U.S.C.A. § 192, that is to say, whether they are to be treated as one vessel. In *Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 47 S. Ct. 368, 71 L. Ed. 663, the tug and the barge were so treated in a case where they both had the same owner. Similarly, in *In re O'Donnell*, 2 Cir., 26 F. 2d 334, the same result was reached where the tug and barges were owned by different persons but under an arrangement for sharing profits. Libellants contend that unless the *Sacramento Navigation Company* case is extended beyond what they contend are the permitted limits of that decision, the Harter Act should not be held to apply to the present case and that, therefore, recovery should be allowed against the Tug Trojan for the loss of the cargo. With this contention of libel-

[26] 51 F. Supp. 425.

lants we do not agree. We do not understand that the Supreme Court in its decision in the *Sacramento Navigation Company* case intended to draw any sharp lines as respects ownership of the two vessels. It is true, as libellants contend, in that case certain language is employed with respect to *The Murrell*, 1 Cir., 195 F. 483, and *The Coastwise*, 1 Cir., 233 F. 1, which might, *prima facie*, tend to indicate the limitation in the *Sacramento Navigation Company* case for which libellants contend. With respect to these cases, the Supreme Court said, 273 U.S. at page 331, 47 S. Ct. at page 370, 71 L. Ed. 663: 'Some things are said in those cases which, if we should not consider the differences between them and the present case, might justify this contention. The most important of these differences is that in both cases it was held that contracts of towage and not of affreightment were involved. We do not stop to inquire whether this conclusion as to the nature of the contracts was justified by the facts. It is enough that it was so held, and this holding was the basis of the decisions. Here, upon all the facts, as we have just said, the contract upon which respondent must rest is one of affreightment, the obligation of which is to carry a cargo, not to tow a vessel.'

"From this language, it is clear, first, that the Supreme Court intended to rest its distinction between the *Sacramento Navigation Company* case and these earlier decisions upon a definite difference understood to exist between the character of the contracts of carriage, namely, that the contract was one of affreightment in the *Sacramento Navigation Company* case, and one of towage in the other cases. An examination of these earlier cases indicates that such was true. Charter party agreements, not bills of lading, were the subject of interpretation. Such, it is to be noted, is not true with respect to the cargo in the present case. We have only the bill of lading, a contract of affreightment. We are satisfied that the following

> very clear and succinct language of the court in the *Sacramento Navigation Company* case must be treated as controlling in the present instance unless we are prepared, as we are not, to rest our decision upon what we believe to be an unreasonably narrow distinction (273 U.S. at pages 328, 329, 47 S. Ct. at page 369, 71 L. Ed. 663): * * * [Here the Court quotes from the opinion in *Sacramento Navigation Company v. Salz* the extract reproduced in the Appendix *infra* p. 51.]

We submit that the rule announced by the Second Circuit in *In Re O'Donnell* and by the District Courts in the cases of *The Lehigh* (D.C. W.D. N.Y., 1935), 12 F. Supp. 75, and *The Vale Royal* (D.C.D. Md., 1943) 51 F. Supp. 412, is correct and that the test of common ownership of the barge whereon the cargo is laden and the towing vessel as pronounced by the Fifth Circuit is incorrect. Further, it is to be borne in mind that the affreightments performed in those three cases were not governed by Part III of the Interstate Commerce Act. The application of that Act accentuates the error in the holding of the Fifth Circuit that the movement in this case constituted towage, for these reasons:

Holding that the interstate movement of the cargo on the Barge LA BELLE was towage and not affreightment violates the rule that an Interstate Commerce Commission certificated carrier cannot perform for a shipper any service unless that service be provided by the carrier's tariff on file with the Commission and a rate be provided therefor. Such is the specific provision of Sections 306(a) and 306(c) of Part III of the Interstate Commerce Act[27] and the jurisprudence on this subject.[28]

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[27] 49 U.S.C., Section 906, reproduced in the Appendix *infra* p. 63.

[28] *Texas & Pacific R. Co. v. American Tie & Timber Co. Ltd.*, 234 U.S. 138, 34 S. Ct. 885; *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 59 S. Ct. 612.

Valley's tariff on file with the Interstate Commerce Commission[29] did not provide for the towage of any craft other than empty barges and did not publish any rate for the towage of barges with cargo laden thereon.[30] Accordingly, the holding that the movement of the cargo and the Barge LA BELLE constituted towage would result in Valley having performed and the shipper having accepted a service not provided for in Valley's tariff on file with the Interstate Commerce Commission and an unpublished rate, which would amount to a discrimination.

James' ignorance of the provisions of carrier's tariff or the failure of the carrier to quote to the shipper the pertinent provisions of the tariff, both of which have been stressed by the shipper in the lower court, is no excuse[31] which permits either the carrier or the shipper to depart from the strict terms of the tariff, for to do so, as stated, would be for the carrier to grant a discrimination and the shipper to accept one, both reprobated by law. The contractors' equipment which constituted the cargo of the LA BELLE was a commodity the transportation of which was regulated by Part III of the

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[29] Freight Tariff 25-C, I.C.C. 101 sent to this Court in the original

[30] The only towage rates published by Valley and then in effect are to be found in its Freight Tariff 25-C, I.C.C. 101, Items 5000, 5010, 5020, 5030 and 5060 (p. 96), which provided rates for the towage of empty barges only between certain places, with these rates to be computed on the basis of the top surface area of the barge and the barge's mean draft. See page 96 of the tariff Exhibit Valley 7, sent to this Court in the original.

[31] *Atchison, Topeka & Santa Fe Railway Company v. C. E. Robinson*, 233 U.S. 173, 34 S. Ct. 556; *Southern Railway Company v. W. E. Prescott*, 240 U.S. 632, 36 S. Ct. 469; *Pittsburgh, C. C. & St. L. Ry. Co. v. Fink*, 250 U.S. 577, 40 S. Ct. 27; *New York Cent. & H. R. R. Co. v. York & Whitney Co.*, 256 U.S. 406, 41 S. Ct. 509; *Chesapeake & O. Ry. Co. v. Martin, et al.*, 283 U.S. 209, 51 S. Ct. 453; *Lowden, et al v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 59 S. Ct. 612; *Strawberry Growers' Selling Co., Inc. v. American Ry. Express Co.* (5 C.C.A.) 31 F. 2d 947; *Socony-Vacuum Oil Co. v. Smith* (C.A. 5, 1950) 179 F. 2d 672, 675; *Union Pac. R. Co. v. Gaede* (C.A. 10, 1940) 110 F. 2d 931, 933; *West India Oil Co. v. Compania Transatlantica de Barcelona* (C.C.A. 2, 1924) 5 F. 2d 425, 430; *Martug Towing Co. v. Eastern Transp. Co.* (C.A. 3, 1945) 152 F. 2d 924, 929.

Interstate Commerce Act. Whether or not James was cognizant thereof, it would have been illegal for James to have procured the transportation of this equipment by a carrier other than one properly certificated by the Interstate Commerce Commission under Part III of the Interstate Commerce Act. James could not even have chartered or leased a tug to tow the laden barge except from a carrier certificated to perform this service by the Interstate Commerce Commission.[32]

Section 11(a) of Valley's bill of lading[33] specifically provides that the carrier shall be entitled to the benefit of Section 3 of the Harter Act. However, the Court of Appeals appears to have been influenced to some extent by the fact that the bill of lading for this shipment of contractors' equipment was not issued until after the barge had sunk. Interstate carriers by water are required by law to issue bills of lading.[34] We submit that the fact that the bill of lading for this shipment was not issued until after the barge had sunk is wholly immaterial and that it would have been immaterial if the bill of lading had never been issued. Notwithstanding the fact that a bill of lading is not actually issued, both the carrier and the shipper are bound by the terms of the bill of lading prescribed for the shipment by the Interstate Commerce Commission; in this case the bill of lading in the

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[32] Section 302(e) of Part III of the Interstate Commerce Act, reproduced in the Appendix *infra* page 61, provides that the furnishing for compensation under a charter, lease or other agreement, of a vessel to a person other than a carrier subject to the Act, to be used by such person in the transportation of its own property, shall be considered to constitute as to the vessel so furnished engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the definition of "contract carrier by water" contained in sub-paragraph (e).

[33] This bill of lading sent to this Court in the original and Section 11(a) reproduced in the Appendix *infra* p. 53.

[34] Section 4 of the Harter Act, reproduced in the Appendix *infra* p. 55.

form provided in Mississippi Valley Barge Line Company's Freight Tariff 25-C, I.C.C. 101.[35]

The District Judge relied heavily on *Cornell Steamboat Co. v. United States*, 321 U.S. 634, 64 S. Ct. 768.[36] The Court of Appeals in its opinion made only bare mention of this case without any particular application.[37] We submit that *Cornell Steamboat Co.-United States* has no application to the cases at bar. All that Your Honors decided in that case was that where a towboat company held itself out to the public as ready to perform for any one the service of towing a barge interstate for one rate regardless of whether or not cargo was laden thereon, the towing company became a common carrier subject to regulation under Part III of the Interstate Commerce Act. In that case, unlike the cases at bar, the movement was admittedly towage. The question was not presented to Your Honors as to what constituted affreightment and what constituted towage, and, of course, the decision in that case does not resolve that point.

Accordingly, we submit that the Court of Appeals erred in characterizing the movement of the cargo on the Barge LA BELLE as towage rather than affreightment and as a corollary thereto erred in holding that Valley did not have the benefit of Section 3 of the Harter Act as to cargo.

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[35] 13 C.J.S., Carriers, § 123b, pp. 237-238; *New York Cent. R. Co. v. Lazarus* (C.C.A. 2, 1922) 278 F. 900; *Charles J. Webb Sons Co. v. Central R. Co. of N. J.* (D.C., S.D. N.Y., 1928) 28 F. 2d 392; *Atlantic Coast Line R. Co. v. Clinchfield Fuel Co.* (D.C. W.D. S.C., 1951) 94 F. Supp. 992; *New England Fruit & Produce Co. v. Hines*, 97 Conn. 225, 116 A. 243; *Western Maryland Ry. Co. v. Cross*, 96 W. Va. 666, 123 S.E. 572; *Chesapeake & O. Ry. Co. v. Glogora Coal Co.*, 113 W. Va. 796, 169 S.E. 471, certiorari denied, 290 U.S. 658, 54 S. Ct. 73.

[36] R. 372-373.

[37] R. 396, wherein the Court of Appeals states that the shippers rely on that case as destroying or greatly limiting the effect of Your Honors' decision in *Sacramento Navigation Company v. Salz*, but without expressing any opinion on the validity of that argument.

II.

Not only is Valley entitled to the benefit of Section 3 of the Harter Act for the loss of and damage to the cargo laden on the Barge LA BELLE, but in addition Valley is entitled as to both the barge and cargo to the benefit of the limitations on its liability contained in its tariff filed with the Interstate Commerce Commission.[38] Both the District Court and the Court of Appeals have declared these tariff provisions invalid on the basis of Your Honors' decision in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 75 S. Ct. 629. We submit that this is a wholly unwarranted application of the doctrine of the *Bisso* case.

The *Bisso* case lacked four of the essential ingredients found in this case. First, in the *Bisso* case the movement was admittedly towage and not affreightment. Second, Bisso was a private tower and not one subject to the jurisdiction of the Interstate Commerce Commission. Third, the agreement between Bisso and the shipper was a private contract of towage and not one made pursuant to a tariff on file with and promulgated by the Interstate Commerce Commission. Fourth—and though last, certainly not least, for it is an important ingredient—in the *Bisso* case the owner of the craft towed was not afforded a choice of rates, such as in this case.

As Mr. M .C. Pearson, Mississippi Valley Barge Line Company's Traffic Manager, who published Valley's Freight Tariff 25-C, I.C.C. 101[39] testified,[40] in making Valley's rates he takes into consideration the costs, which includes all expenses plus a fair profit and the cost of

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[38] Reproduced in Appendix *infra* p. 65 *ff.*

[39] R. 167.

[40] R. 172.

insurance where Valley has any liability for loss of or damage to cargo. The pertinent portion of his testimony was given in answer to the question whether the question of insurance or liability enters into the rate structure. He replied:

> "Yes, it does, as will be observed from the Exhibit-8, I believe it was. There is a difference between the A, B, and C rates. The B rates are lower than the A rates because of the difference in liability assumed by this company, which takes into consideration that the shipper-customer must purchase insurance if he wants it insured. Likewise, the 'C' rates which apply in customers' barges, takes into consideration that the customer supplies the barge in which we transport the freight, and, of course, also furnishes his own insurance."

There is no contrary testimony, yet the decision of the Court of Appeals in these cases produces the incongruous result that for the lowest of the three rates the shipper has been afforded the protection against loss of or damage to cargo provided only by the highest of the three rates, the "A" rate, because by its express terms the intermediate, or "B" rate, which is indisputably an affreightment rate, affords carriage subject to the provisions of Section 3 of the Harter Act. Likewise the decision of the Court of Appeals in these cases produces the incongruous result that the carrier finds itself saddled with a liability which it assumed only under an "A" rate—its highest rate, and a liability which it has not insured because its rate did not include anything with which to purchase insurance.

Accordingly, we submit that the *Bisso* case is not authority for holding invalid the liability clauses em-

bodied in Valley's I.C.C. Tariff. Furthermore, we submit that in any event the courts are without primary jurisdiction to consider the validity of those provisions, that jurisdiction being confined solely to the Interstate Commerce Commission, in accordance with the doctrine announced by Your Honors in *U. S. v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S. Ct. 161,[41] wherein Your Honors quite pertinently remarked:

> "A tariff is not an abstraction. It embodies an analysis of the costs incurred in the transportation of a certain article and a decision as to how much should, therefore, be charged for the carriage of that article in order to produce a fair and reasonable return. Complex and technical cost-allocation and accounting problems must be solved in setting the tariff initially."

Here Valley has published three rates—an "A" rate, a "B" rate and a "C" rate. To fix the level of each of these rates requires an analysis of the costs incurred in the transportation of the article, the cost of furnishing equipment, the cost of the carrier's providing insurance to cover loss of and damage to cargo, all of which must be determined to produce for the carrier a fair and reasonable return for the transportation of the cargo.

The liability assumed by the carrier for loss of and damage to cargo is one of the principal items which entered into each of these three rates: under the highest, or "A" rate, the carrier assumes the greatest liability; under the "B" rate, a lesser liability; and under the "C" rate, which is the lowest rate, no liability. Obviously that rate does not contain anything for cargo insurance taken out by the carrier.

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[41] To the same effect see *Texas & P. R. Co. v. American Tie & Timber Co. Ltd.*, 234 U.S. 138, 34 S. Ct. 885.

We submit that the Courts should not undertake to pass on the validity of the liability features of the tariff and that if any question of the validity of those rates is involved, that is a matter which should be referred to the Interstate Commerce Commission.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writs of certiorari should be granted and that the judgments of the Court of Appeals should be reversed.

Respectfully submitted,

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OPINION OF
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(May 3, 1957.)

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

HUTCHESON, Chief Judge: These two appeals from judgments in related actions, arising out of the sinking of the LaBelle and consolidated for trial, present for our decision two primary questions: one, whether the district judge correctly held [1] that the sinking was due to the negligence and fault of the appellant; the other, if so, whether the appellant was entitled to invoke the exoneration afforded by Section 3 of the Harter Act and the defensive clauses of the bill of lading.

The answer to the first question depends merely upon an appraisement of the facts in evidence. The answer to the second question depends upon whether the transportation involved was carriage or towage, and whether if it was carriage, Valley was entitled under the circumstances to invoke Section 3 of the Harter Act. The overall answers to both questions depend upon whether the district judge was correct in his determination of fact and of law as to Valley's liability in connection with the sinking of the barge.

This is the origin of the two actions. In December of 1954, T. L. James & Co., Inc., hereafter called "James", engaged in the general contracting and construction business with offices at Houston, Texas, and Kenner, Louisiana, and Mississippi Valley Barge Line Co., hereafter

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[1] *Mississippi Valley Barge Line vs. T. L. James & Co.*, 144 F. Supp. 662.

called "Valley", a common carrier by water, which holds an Interstate Commerce Commission certificate,[2] entered into an agreement that Valley would transport the barge LaBelle, supplied and loaded by James with a bulldozer and other miscellaneous contractors' equipment, from New Orleans, La. to Cheatham Dam, Tennessee, for an agreed upon charge, and would return the barge to New Orleans empty without charge. Enroute the barge careened and dumped its load and then sank in the Mississippi River, thereby precipitating this litigation.

It was initiated by a suit at law filed by Valley against James for the freight money and the Federal transportation tax due thereon for transporting the cargo of contractor's equipment pursuant to a provision in Valley's tariff on file with the Interstate Commerce Commission for the collection and payment of the transportation charges, notwithstanding the fact that the cargo was lost en route.

Subsequently, James, as bareboat charterer of the Barge LaBelle, sued in admiralty for its damages allegedly incurred because of the sinking of the barge, and James, together with Brown & Root, Inc. doing business under the name of Louisiana Bridge Company, hereinaf-

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[2] The pertinent provisions of which are:

"It is hereby certified, That public convenience and necessity require operation by the Mississippi Valley Barge Line Company as a common carrier, in interstate or foreign commerce, by nonself-propelled vessels with the *use of separate towing vessels in the transportation of commodities generally and by towing vessels in the performance of general towage, between ports and points along* * * * [Here follows a lengthy description of waterways, including the route from New Orleans to Cheatham Dam, Tennessee, over the several waterways involved].

"It is ordered, That the Mississippi Valley Barge Line Company be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or hereafter may be, attached to the exercise of such authority from this Commission." (emphasis supplied)

ter called "Shippers"), alleging that they were the owners of the contractors' equipment laden on the Barge LaBelle, joined in this admiralty action claiming the damages allegedly sustained by them as such cargo owners resulting from the sinking of the barge. Valley filed a 56th Rule Petition against James alleging that James had warranted that the Barge LaBelle was seaworthy and the cargo properly stowed thereon and demanded that in the event Valley be held liable for loss of or damage to the Barge LaBelle or its cargo, due to unseaworthiness of the barge or improper storage of cargo thereon, Valley be awarded a decree for a similar amount over against James.

In the suit by James and Shippers against Valley for their damages, the District Court entered an interlocutory decree holding that the transportation of the contractors' equipment on the Barge LaBelle constituted towage, and not carriage, and that Valley was liable for damages for negligent towage. The district judge dismissed Valley's 56th Rule Petition against James for alleged breach of warranty of the seaworthiness of the Barge LaBelle and the propriety of the stowage of the cargo thereon. In the suit by Valley against James for its freight money, the district judge held that the question had become moot by reason of his holding that Valley was at fault for negligent towage, since permitting it to recover its freight charges and the transportation tax thereon would simply increase the Shippers' damages. Accordingly, he dismissed Valley's suit against James.

Appealing from these decrees in Docket Nos. 16469 and 16470 of this court, Valley is here thus presenting, under six specifications of error [3] the two prime questions

[3] "1. The court erred in holding that the transportation contract between T. L. James & Co., Inc. and Mississippi Valley Barge Line Company was a contract of towage and not a contract of carriage.

(Continued)

with their corollaries:

> "The principal question presented is whether contract for the transportation by Valley of the contractors' equipment laden by the Shippers on board its barge LaBelle was carriage or towage. While corollaries to this principal question are:
>
> "(1) If the movement was carriage and the defense of the exoneration of the carrier afforded by Section 3 of the Harter Act is available, then was there any failure in care and custody of cargo which would render the carrier liable for damage thereto?
>
> "(2) If the transportation of the contractors' equipment constituted towage, was there any negligence on the part of the tower which renders it liable for damage to cargo?
>
> "The second question involved, which necessarily arises if your Honors determine that the transportation of the cargo was carriage, is the status of the movement of the Barge LaBelle. Was it carriage or towage, and what is Valley's liability, if any, for the sinking of the barge?"

In support of its contention that the transportation of LaBelle with its cargo in tow of a tug is carriage and

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[3] (Continued)

"2. The court erred in holding that the movement of the cargo of contractors' equipment loaded aboard the Barge LaBelle was towage and not common carriage.

"3. The court erred in failing to give effect to Sec. 3 of the Harter Act and failing to exonerate Mississippi Valley Barge Line Company.

"4. The court erred in failing to give effect to the tariffs of Mississippi Valley Barge Line Company and to the terms and conditions of the bill of lading issued and delivered to the shipper, T. L. James & Co., Inc.

"5. Alternatively, if the movement was towage, then the court erred in finding negligence on the part of Mississippi Valley Barge Line Company in the performance of such towage."

While in Docket No. 16,470 Valley assigns as additional error:

> "The district court erred in holding that Valley was not entitled to recover its freight charges and the Federal transportation tax thereon from James."

not towage, appellant plants itself firmly on *Sacramento Navigation Co. vs. Salz*, 273 U.S. 326, a case where, unlike here, the carrier was the owner and operator of both barge and tug. There the Supreme Court, reversing the opinion of the Ninth Circuit, 3 Federal(2) 759, and saying: "Towage service is the employment of one vessel to expedite the voyage of another", went on to say: "Here, while there was towage service, the contract actually made with respondent was not to tow a vessel but to transport goods and plainly that contract was the contract of affreightment."

Based on this decision and arguing that the line of demarcation between carriage and towage is definite and unmistakable, appellant urges upon us that, in disregarding the Sacramento case as controlling and supporting his opinion by citing *Cornell Steamboat Co. v. United States*, 312 U.S. 634, the district judge erroneously rejected an opinion which is controlling on its facts and law, on the basis of an opinion which is without pertinence to the question dealt with here, whether the contract was one of towage or one of carriage.

Realizing the pinch of the argument that in the Sacramento case both barge and tug were owned by the carrier, whereas in this case the towed vessel was not owned by it, appellant seeks to avoid the force of the argument based upon this fact by pointing out that in performing inland water carriage of cargo, a shipper may supply an instrumentality used in the carriage, and, of course, a barge is such an instrumentality, and cites and relies on In Re: O'Donnell, 26 F (2) [*sic*], where the court applied the doctrine of the Sacramento case to a case in which, while there was no common ownership of the tug and barge, the tug owner and the barge owner were sharing

expenses and profits, and, if not actually partners, were participating in a joint venture.

On the question whether there was negligence in the handling of the barge, as the district court held, appellant argues vigorously and long that there was no negligence, and that irrespective of the terms of Valley's tariff, Valley is not liable.

Recognizing that both carriers and towers which tow interstate are subject to regulation under Part III of the Interstate Commerce Act, *Cornell Steamboat Co. v. United States, supra*, and that all common carriers, whether engaged in the carriage of cargoes, are required to file with the commission their tariffs and to include therein any rules or regulations which in anywise change, affect or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the purchasers, shipper, or consignee, appellant points to the fact that Valley did file its tariff and that it contained all the rates, rules, and regulations applicable to freight transported by Valley and consisted of A. B. & C. rates. As a part of this tariff, appellant points to the provision applicable where barges are furnished for transportation, that under "C" rates, which it claims was the rate under which this shipment moved, the customer warrants that barges are seaworthy and properly equipped, and that the shipment is properly stowed therein. In addition, it points to a provision of the tariff outlawed in the Bisso case,[4] a case of towage, in effect that the towage will be performed solely at the risk of the tow and its cargo, including the risk of negligence of the towing craft, its master, pilot, officers and crew, and of the contractor and its agents, servants, employees and representatives, all of whom in respect to the towage shall become and be the

[4] *Bisso v. Inland Waterways Corp.*, 349 U.S. 85.

agents and servants of the tow and its owners. So pointing, it seeks to found upon the fact that this provision is in a tariff a claim that it is not subject to the holding in the Bisso case.

The appellees, on their part, standing firmly by the decision of the district judge, urge upon us that it was correct in all respects and that the decree should be affirmed throughout. Taking issue with the appellant as to the effect of the Cornell case, they argue that, though that was a litigation originating before the Interstate Commerce Commission, 250 I.C.C. 301, continuing through the decision of the three judge court, *Cornell Steamboat Co. v. United States*, 53 F. Supp. 349, and concluding with what it calls the landmark opinion in *Cornell Steamboat Co. v. United States*, 312 U.S. 634, whatever force and effect the Sacramento case had, has been destroyed or greatly limited by this decision.

Citing petition of Reliance Co., 89 F. Supp. 272, holding that the existence of a published tariff did not serve to transform a private carriage into a public carriage, they seek to strike down all weight attached by appellant to its published tariff. Pointing to the basic finding of the district judge, "This litigation presents * * * an attempt to apply the law of common carriage to a contract of towage and thus avoid the public policy restrictions against release from liability from negligence clauses in towage contracts", appellees cite other recent district court cases, each holding that a contract such as the one here, which was claimed to be one of carriage, was in fact one of towage.

Finally, pointing to the facts: that the opinion in the Sacramento case turned entirely upon the fact that both tow and tug were owned by the carrier; that the Supreme

Court held that the contract was not one for towage; that in the O'Donnell case, *supra*, the court in effect held that the owner of the tug and the owner of the barge had made a joint contract of carriage with the shipper; appellees point out that the facts[5] here are entirely different.

Because the district judge, in his opinion, fully and adequately set out the facts bearing on the question of negligence in handling the LaBelle, and we agree fully with his statements of the facts and his findings on the issue of negligence, we will content ourselves with saying so and that unless appellant is entitled to be relieved from liability under the Harter Act or under some defensive clause of its bill of lading, the judgment must be affirmed. Addressing ourselves, therefore, first to the claim that the clause, exempting it from liability for negligence and in effect purporting to make its own employees the agents of the barge owner, exonerated appellant it is sufficient to say that the validity of this clause has been definitely and conclusively settled against it

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[5] Mr. Walters for James testified: "I contacted Mississippi Valley from Houston requesting them to give me a price for the movement of the barge from New Orleans to Ashland City or Cheatham Locks, Tennessee, and received a minimum cargo rate for 300 tons which was less than the weight of the cargo." Nothing was said about affreightment. Only towage was discussed. Nothing was said about a bill of lading or its contents. The bill of lading was in fact received several weeks after the cargo was lost.

While Mr. Thompson for Valley did say that he mentioned the word "tariff" in the telephone conversation, he admitted that none of the tariff provisions were quoted or discussed, and he did not deny that the subject of the conversation was the movement of the barge.

The confirmatory letter of Dec. 8th, from Thompson to Walters began, "This will confirm recent conversations concerning your barge LaBelle and subsequent empties which you desire to move from New Orleans to Cheatham Dam, Tennessee and return."

The telegram of the same day read, "Will move barge LaBelle Dec. 11, to Cheatham, rate $6.30 per net ton plus 15%. Minimum weight 300 tons."

Walters replied by wire, "Consider this formal acceptance your offer of barge movement."

It was only after the barge was lost that the bill of lading was issued and the present contentions with regard to the contract were put forward.

in the Bisso case, and that, as pointed out in the opinion of the district judge below and in the briefs of the appellees here, the fact that this illegal clause is embodied in a tariff cannot make it legal.

Upon the crucial question, whether the contract was and was intended to be one of towage rather than of affreightment, we are of the clear opinion that no other reasonable view can be taken of the evidence than that the district court took. The fact that both the oral agreement and its written *confirmations provided for moving the barge;* the fact that nothing was said at the time of the contract about the matters now so strongly urged, *that the agreement was not one of towage but one of affreightment;* and the fact that the bill of lading was not issued until sometime after the loss; not only tends strongly we think to support but also to compel the view that the parties were contracting not for affreightment but for a towage service and that the district judge was right in so holding.

While, therefore, we are inclined to the view that the undisputed facts do not bring Valley within the essential requirements of Sec. 3, "*If the owner of any vessel* transporting merchandise or property to and from any port in the United States, *shall exercise due diligence to make the vessel* in all respects seaworthy * * *." (emphasis supplied), in that Valley was not the owner of the vessel LaBelle in which the merchandise was loaded and Valley did nothing whatever to make the vessel LaBelle seaworthy, and it would be in our opinion a perversion of the statute, which was designed to encourage and require owners to make their vessels seaworthy, to permit Valley to invoke the section in connection with a carriage where it neither owned, nor had part in conditioning, the vessel in respect of which the exoneration

is claimed, because of our conclusion that the contract was for towage, we do not express a firm opinion on this point.

Finally, as to the alternative holding of the district judge, that if the contract was for affreightment the LaBelle was itself the cargo, and the provision in the Harter Act which prevents the application of the section, that the lack of diligence which is excused is not with respect to the care of the cargo, defeats its application here, while at first blush the idea seems fanciful, it seems no more fanciful than the general claim of the appellant that in this kind of case it can escape the consequences of its negligence in connection with the towing of the LaBelle by claiming the protection of the tariff and of the Harter Act. Since, however, we have concluded to affirm the judgment on the ground that the movement was one of towage, it will not become necessary to, and we refrain from expressing a definite opinion on this point.

The judgment was right. It is AFFIRMED.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

(September 2, 1956)

WRIGHT, District Judge:

This litigation presents a valiant but unsuccessful attempt to apply the law of common carriage to a contract of towage and thus avoid the public policy restrictions against release from liability for negligence clauses in towage contracts.[1] For the reasons hereinafter an-

[1] See *Bisso v. Inland Waterways Corp.*, 349 U.S. 85.

nounced, this attempt fails, not only because certification as a common carrier under the Interstate Commerce Act [2] does not render the law with reference to towage inapplicable, but also because the loss here was caused by improvident care of cargo, which, even under the Harter Act, is excepted from exoneration.[3]

On December 11, 1954 the barge LaBelle, in tow of the M/V L. Wade Childress and loaded with a valuable cargo of contractors' equipment, dumped its cargo and sank in the Mississippi River approximately opposite the Plaquemine Locks. At the time of the casualty the Childress was owned and operated by the Mississippi Valley Barge Line Company. The LaBelle was under bareboat charter to T. L. James & Co., Inc. and Brown & Root, Inc., d/b/a Louisiana Bridge Company, and the cargo of contractors' equipment was owned by T. L. James & Co., Inc.

The LaBelle was a converted ferryboat with a flat steel deck. It was 150′ in length by 35′ in breadth by 5′6″ in depth. When originally built in 1922 it had a beam of 28′. On conversion, a 3′ wide sponson, or blister, which ran the full depth of the hull to 40′ from each end of the barge, was added to each side. Holes approximately 30″ square and approximately 30″ from the bottom plating were cut in the side plating of the original barge, leading into the wing compartments adjacent to the sponson. Ten-inch pipes had been run through the three fore and aft bulkheads about 1′ up from the bottom of the barge. When removed in conversion, these 10″ openings had not been closed. The five athwartship bulkheads of the original hull were watertight up to a few inches of the deck of the barge. The three fore and aft

[2] 49 U.S.C. §901 *et seq.*
[3] 46 U.S.C. §190.

bulkheads were not watertight. Water moved freely from one side of the vessel to the other within the athwartship bulkheads.

On December 4, 1954, one week before the casualty in suit, the LaBelle departed New Orleans in tow for Krotz Springs, Louisiana, where on December 6, 1954 it was loaded with the contractors' equipment.[4] The loading was effected by grounding the forward end of the barge on the bank of the Atchafalaya River and working the equipment aboard. On December 6, 1954, the LaBelle departed Krotz Springs in tow of a pushing tug and arrived without incident at New Orleans on December 8, 1954, where custody of the barge in its loaded condition was accepted by Mississippi Valley. At the time, the LaBelle had a freeboard of approximately 2′ port and starboard, 3′ at the bow and 4′ at the stern. She was in all respects trim and apparently seaworthy.

The LaBelle departed New Orleans December 10, 1954 at about 7:00 P.M. northbound up the Mississippi River for Cheatham Dam, Tennessee. It was incorporated as the lead barge in the starboard string in a tow of 18 barges with the towboat, L. Wade Childress, owned and operated by Mississippi Valley, pushing. About 2:00

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[4] The equipment consisted of:

1—54B Diesel Bucyrus Erie Dragline;

1—803 Diesel Koehring Dragline complete with one 2¼ cy. Hendricks dragbucket;

1—D8 Caterpillar tractor equipped with cable controlled Bulldozer;

1—Ford pickup (privately owned) loaded with employees' tool boxes;

1—8′ x 10′ Tool house loaded with miscellaneous rigging and rope supplies;

10—New 5′ x 26′ crane mats;

1—200 amp. welding machine on skids;

1—Ford pickup loaded with one 200 amp. Lincoln welding machine and one cutting outfit.

on the morning of December 11th, the mate, Lowder, discovered water in the port and starboard wing compartments or holds of the barge, forward of amidship. Assisted by a deck hand, he placed a 3" electric pump into the starboard hold through the hatch opening and started pumping operations. At 5:00 A.M., although the pump had gained considerably on the water, there was still about 1' of water in the hold. He allowed the pump to continue running and notified the second mate, who relieved him. Lowder testified that though the pump was placed in the starboard wing compartment, the port wing compartment was being drained by it as well.

At 6:00 A.M. the second mate found that the holds had been pumped dry and stopped the pump. The pump was not started again until 11:45 A.M. when the master on the bridge saw that the bow of the LaBelle was settling in the water. He instructed the mate to inspect the barge and, on being relieved by the pilot, proceeded to the barge himself. On arriving at the barge, he decided that the barge was so full of water that it should be beached. While the mate was attempting to install pumps through the hatchways which were accessible, the master ordered the barge "topped around", or pivoted around by letting go all lines except the stern lines on the starboard side, so that the barge could be towed high end forward to the beach on the east side of the river at Melody Point. Within a few minutes, however, the LaBelle dumped its cargo over its bow, broke loose from its moorings and sank, bow end first, into the Mississippi River. Subsequently, the LaBelle was raised. When the barge was inspected on dry dock, an L-shaped aperture in the bottom of the sponson, 2' from the starboard side and 51' from the stern, was discovered. The L-shaped aperture was approximately 30" in size with the two legs

of the L approximately 4" in width.

This litigation was instituted by the filing of a civil action by the carrier to recover its transportation charges against T. L. James & Co., Inc. James answered denying liability and counter-claiming for $75,000 covering the loss of the contractors' equipment. Subsequently, James and Brown & Root, doing business as Louisiana Bridge Company, and James, individually, filed a libel in admiralty in which James reiterated the $75,000 claim for loss of the contractors' equipment and James and Brown & Root together, under the name of the Louisiana Bridge Company, additionally claimed $7500 covering the cost of salvaging and repairing the barge LaBelle. The carrier answered this libel denying liability and filing an interpleader under Admiralty Rule 56 against James claiming reimbursement from James of any amount which it might be required to pay because of any unseaworthiness of the barge, LaBelle, or any improper stowage of the cargo, on the theory that James had warranted to the carrier that the barge was seaworthy and that its cargo was properly loaded and stowed.

The carrier contends that the loss in suit was not caused by its negligence or the negligence of its employees, that water entering the LaBelle through the hole in the blister caused it to lose its buoyancy, and that the blister was holed during loading before the barge was delivered to the carrier's custody. In the alternative, it argues that, being a certificated common carrier under the Interstate Commerce Act, shippers are bound by its tariff filed with the Commission and incorporated in the bill of lading, which tariff exonerates the carrier from liability for any negligence on the part of itself or its employees. In any event, the carrier claims the protec-

tion of Section 3 of the Harter Act[5] which releases a carrier from liability for errors in navigation or management of the vessel provided the owner thereof exercises due diligence to make the vessel seaworthy. The carrier also maintains that, under its tariff, it is entitled to payment of the freight in spite of the fact the cargo was never delivered.

T. L. James & Co. and the Louisiana Bridge Company contend that involved here is a simple contract of towage and that no tariff filed with the Commission, or bill of lading issued pursuant thereto, can relieve the carrier for loss occasioned by the negligence of its employees. They also contend that they are not liable for the freight because it was not earned, because the provision in the bill of lading stating that freight shall become earned and payable at the beginning of the voyage is not enforceable as against public policy, and for the further reason that the bill of lading did not accompany the shipment, was not contemplated by the parties, and, in fact, was not issued until several weeks after the loss.

The history of the fight of the common carrier to relieve itself of the stringent liability imposed by the

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[5] Section 3 of the Harter Act, 46 U.S.C. §192, reads:

"If the owner of any vessel transporting merchandise or property to and from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

common law is well known. The history of the fight to exempt towage from common carrier liability is likewise well known. Unsuccessful in their attempt to obtain judicial approval for release from liability clauses in their carriage contracts,[6] the carriers persuaded the Congress to pass the Harter Act in 1893. With reference to towage contracts, the Supreme Court in 1955, having previously exempted the tower from carrier liability,[7] after backing and filling for many years,[8] finally and definitively held that release from liability for negligence clauses in towage contracts are illegal as against public policy. *Bisso v. Inland Waterways Corp., supra.* Adjusting its cap to fit the change in circumstance, Mississippi Valley maintains that the contract of towage in suit is a contract of common carriage after all, and that as such it is entitled to the protection of Section 3 of the Harter Act[9] as well as the release from liability provisions of its tariff filed with the Commission pursuant to the Interstate Commerce Act.[10]

The carrier's contention is in the teeth of the opinion of the Supreme Court in *Cornell Steamboat Co. v. United States*, 321 U.S. 634. In deciding that persons engaged in the business of towage were subject to regulation as common carriers, the three-judge district court held that "By labeling persons such as plaintiff 'common carriers' * * * they do not become such for all purposes" and that

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[6] *Liverpool and Great Western Steam Company v. Phenix Insurance Company*, 129 U.S. 397, 438; *Railroad Company v. Lockwood*, 84 U.S. (17 Wall.) 357.

[7] *Stevens v. The White City*, 285 U.S. 195.

[8] *Compania de Navegacion Interior, S. A. v. Fireman's Fund Ins. Co.*, 277 U.S. 66; *The Steamer Syracuse*, 79 U.S. (12 Wall.) 167. See also *Sun Oil Co. v. Dalzell Towing Co., Inc.*, 287 U.S. 291.

[9] 46 U.S.C. §192.

[10] 49 U.S.C. §901 *et seq.*

Section 320(d)[11] of the Interstate Commerce Act shows that Congress "had in mind the difference between the question of liability and that of regulation." 53 F. Supp. 349, 353. The Supreme Court, in affirming the district court, again referred to Section 320(d) of the Act and stated at Page 637, "The Act * * * is designed, not to determine the legal status of vessels for all purposes, but to provide for regulation of the rates and services of competing interstate water carriers * * *." A study of the Cornell Steamboat litigation through the Commission,[12] the district court, and the Supreme Court leaves no doubt that while a carrier engaged in towage may be required to be certificated under the Act, when that common carrier enters into a contract of towage, that contract is bound, as to liability, not by the law with reference to common carriage, but by the law with reference to towage.

The carrier cites numerous authorities[13] holding that both the carrier and the shipper are bound by the tariff filed with the Commission. These cases, however, refer to rate and related provisions of the tariff. None of them holds that an illegal provision in the tariff is enforceable. Certainly the inclusion of otherwise illegal release clauses in a tariff cannot make such clauses less illegal or more enforceable.

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[11] §320(d) of the Interstate Commerce Act, 49 U.S.C. §920(d) reads:

> "Nothing in this chapter shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this chapter."

[12] 250 I.C.C. 301.

[13] *Lowden et al v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516; *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209; *New York Cent. & H. R. R. Co. v. York & Whitney Co.*, 256 U.S. 406; *Pittsburgh, C., C. & St. L. Ry. Co. v. Fink*, 250 U.S. 577; *Southern Railway Co. v. W. E. Prescott*, 240 U.S. 632; *Atchison, Topeka & Santa Fe Ry. Co. v. C. E. Robinson*, 233 U.S. 173.

The carrier also argues, citing authorities,[14] that only the Interstate Commerce Commission has jurisdiction to inquire into the reasonableness of any provision of the tariff, and therefore this court is without jurisdiction in the premises. Here, however, no question of reasonableness is presented. The question presented is the validity of the release clause in suit. And the Supreme Court has held all release from negligence clauses in towage contracts illegal and unenforceable as against public policy. *Bisso v. Inland Waterways Corp., supra.*

The release from liability clauses relating to towage contracts and incorporated in the carrier's tariff are, therefore, unavailing to the carrier under Bisso, *supra*, and Cornell Steamship, *supra.*[15] So, also, are the provisions of the Harter Act.[16] Assuming the Harter Act is applicable, the carrier would nevertheless be responsible for the loss. The loss here was a direct result of the failure of the carrier properly to care for the cargo in suit. For such negligence, it may not be relieved from liability. See *The Germanic*, 196 U.S. 589; 46 U.S.C. § 190. The cargo here, assuming this is a carriage contract, was the barge itself as well as its contents, and the loss resulted from the carrier's negligent failure properly to tend the barge.

Irrespective of how or when the blister on the barge

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[14] *United States v. Interstate Commerce Commission*, 337 U.S. 426; *Terminal R. Ass'n. of St. Louis v. United States*, 266 U.S. 17; *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456; *Director General of Railroads v. Viscose Co.*, 254 U.S. 498; *Northern Pac. Ry. Co. v. Solum*, 247 U.S. 477; *Loomis v. Lehigh Valley R. Co.*, 240 U.S. 43; *Texas & Pac. R. Co. v. American Tie & Timber Co., Ltd.*, 234 U.S. 138; *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U.S. 184; *Simpson v. Shepard*, 230 U.S. 352; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U.S. 247; *Robinson v. Baltimore & Ohio R. Co.*, 222 U.S. 506; *Aron v. Pennsylvania R. Co.*, 2 Cir., 80 F. 2d 100.

[15] See also *Petition of Reliance Marine Transp. & Const. Corp.*, 89 F. Supp. 272; 1950 A.M.C. 125.

[16] The Harter Act, if applicable, would itself make null and void the release clauses in the tariff in so far as they sought to relieve against negligent care of cargo. 46 U.S.C. §190.

was ruptured, the fact remains that water in the hold, forward of the rupture in the blister, was discovered and pumped out the early morning of the day of the loss. Thereafter, instead of standing by the barge and inspecting the hold at regular intervals, water was not again discovered in the hold until the barge itself was noticed by the captain from the wheelhouse to be down by the head. Inspection at this time revealed that water was then in the hold in such quantity that a decision was made immediately to beach the barge. In an attempt to beach the barge after topping it around, the barge dumped its cargo into the river and sank. Allowing the barge to become so full of water that it was down by the head and in danger of sinking, particularly after being put on notice that the barge was making a controllable amount of water, is negligence of the grossest kind. *Curtis Bay Towing Co. v. Southern Lighterage Corp.*, 4 Cir., 200 F. 2d 33; *F. E. Grauwiller Transp. Co. v. Exner Sand & Gravel Corp.*, 2 Cir., 162 F. 2d 90; *Henry Du Bois Sons Co. v. Pennsylvania R. Co.*, 2 Cir., 47 F. 2d 172. It was the direct and proximate cause of the loss in suit.

Carrier's expert's gratuitous speculation that the hole was punched in the blister during loading at Krotz Springs will not bear analysis. The loading was completed December 6th, after which the barge was delivered to Coyle at New Orleans at 4:00 A.M., December 8th, being towed loaded downriver from Krotz Springs. Inspection by carrier personnel at New Orleans indicated that the LaBelle, as loaded, was in satisfactory condition for towage upstream to Cheatham Dam, Tennessee. Water was first noticed in a forward hold of the vessel on the early morning of December 11th and the hold was pumped dry in a few hours. The LaBelle sank at noon the same day. On these facts, a finding of seaworthiness

of the LaBelle at the time of its delivery to Coyle could easily be supported. The fact, however, that the LaBelle, prior to her loss, was making a controllable amount of water which the carrier negligently failed to control makes the finding of seaworthiness at time of delivery to the carrier's custody unnecessary. Assuming unseaworthiness, the proximate cause of the loss was, not unseaworthiness, but negligent failure to control the water in the holds. *Curtis Bay Towing Co. v. Southern Lighterage Corp, supra; F. E. Grauwiller Transp. Co. v. Exner Sand & Gravel Corp., supra; Henry Du Bois Sons Co. v. Pennsylvania R. Co., supra.*

The carrier's suggestion that water shipped through the ruptured blister caused the barge suddenly to go down by the head and sink is unacceptable. The rupture in the blister was 51′ forward of the stern of the 150′ vessel. The hatches, port and starboard, through which the mate discovered water in the hold and pumped it out, were forward of amidship. Water may have been able to find its way from the blister to the body of the barge itself through the 2′ x 30″ holes in the skin of the vessel, and hence through three 10″ holes, one in each of the three longitudinal bulkheads, across the width of the vessel.[17] But before that water could move forward, it had to rise almost to the deck of the barge in order to overcome the watertight athwartship bulkheads. Obviously, if the holds forward of amidship were kept dry by pumping, as they apparently could have been, no water would have reached the necessary height therein to pass over the watertight bulkhead into the next hold forward. Unless the water did so, the vessel would not

[17] Carrier's expert testified that, with the exception of the three 10″ holes, the longitudinal bulkheads were "more or less" watertight. The proof shows, however, that when the mate, Fowder, pumped out the hold forward of amidship on the starboard side, it drained the corresponding hold on the port side as well.

have become down by the head and in danger of sinking. In other words, if the crew of the Childress had kept the water out of the holds by proper use of the pumps in the hatches which were accessible, sufficient water would not have been shifted forward to cause the vessel's bow to dive.

Finding the carrier responsible for the loss renders moot its claim for freight. Holding T. L. James & Co. for the freight would only increase its damage collectible from the carrier.

Decree for libellants in the Admiralty action, for respondent in the impleader, and for defendant in the Civil Action.

New Orleans, Louisiana, September 25, 1956.

s/ J. Skelly Wright
United States District Judge

JUDGMENT OF THE COURT OF APPEALS

Extract from the Minutes of May 3, 1957.

MISSISSIPPI VALLEY BARGE LINE COMPANY,

No. 16469. versus

T. L. JAMES & CO., INC., ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Mississippi Valley Barge Line Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * * *

JUDGMENT OF THE COURT OF APPEALS

Extract from the Minutes of May 3, 1957.

MISSISSIPPI VALLEY BARGE LINE COMPANY,

No. 16470. versus

T. L. JAMES & CO., INC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appel-

lant, Mississippi Valley Barge Line Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court:

* * * * *

EXCERPT FROM SACRAMENTO NAVIGATION COMPANY v. SALZ, 273 U.S. 326, 47 S. Ct. 368.

"The libel recites that it is 'in a cause of towage,' and in argument this is strenuously insisted upon. Towage service is the employment of one vessel to expedite the voyage of another. Here, while there was towage service, the contract actually made with respondent was not to tow a vessel, but to transport goods, and plainly that contract was a contract of affreightment. See *Bramble v. Culmer* (C.C.A.) 78 F. 497, 501; *The Nettie Quill* (D.C.) 124 F. 667, 670. Respondent's contention, however, seems to be that the shipping contract as evidenced by the bill of lading was with or for the barge alone, but that, when petitioner took the barge in tow, an implied contract of towage with respondent at once arose. This view of the matter, we think, is fallacious.

"The fact that we are dealing with vessels, which by a fiction of the law are invested with personality, does not require us to disregard the actualities of the situation, namely, that the owner of the tug towed his own barge as a necessary incident of the contract of affreightment, and that the transportation of the cargo was in fact effected by their joint operation. The bill of lading declares that the cargo was shipped *on board* the barge.

But it was to be transported, and this the barge alone was incapable of doing, since she had no power of self-movement. It results, necessarily, that it was within the contemplation of the contract that the transportation would be accomplished by combining the barge with a vessel having such power. Respondent says there was an implied contract to this effect; that is, as we understand, a distinct contract implied in fact. But a contract includes, not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made. 3 Williston on Contracts, § 1293; *Brodie v. Cardiff Corporation* [1919] A. C. 337, 358. And there is no justification here for going beyond the contract actually made to invoke the conception of an independent implied contract.

"Considering the language of the bill of lading in the light of all the circumstances, it is manifest that we are dealing with a single contract, and the use of the tug must be read into that contract as an indispensable factor in the performance of its obligations. To transport means to convey or carry from one place to another; and a transportation contract for the barge without the tug would have been as futile as a contract for the use of a freight car without a locomotive. In this view, by the terms of the contract of affreightment, in part expressed and in part necessarily resulting from that which was expressed, the transportation of the goods was called for, not by the barge, an inert thing, but by the barge and tug, constituting together the effective instrumentality to that end."

PERTINENT PROVISIONS OF THE CERTIFICATE ISSUED TO VALLEY BY THE INTERSTATE COMMERCE COMMISSION

It is hereby certified, That public convenience and necessity require operation by the Mississippi Valley Barge Line Company as a common carrier, in interstate or foreign commerce, by nonself-propelled vessels with the use of separate towing vessels in the transportation of commodities generally and by towing vessels in the performance of general towage, between ports and points along * * * [Here follows a lengthy description of waterways, including the route from New Orleans to Cheatham Dam, Tennessee, over the several waterways involved].

It is ordered, That the Mississippi Valley Barge Line Company be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or hereafter may be, attached to the exercise of such authority from this Commission.

It is further ordered, That the holding of this third amended certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act, and the orders, rules, and regulations of the Commission thereunder.

SECTION 11(a) OF VALLEY'S BILL OF LADING

All carriage hereunder shall be performed subject to all of the terms and provisions of, and all the exemptions from and limitation of liability contained in, the

Act of Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of all other statutes of the United States according to carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith.

SECTION 3 OF THE HARTER ACT, BEING 46 U.S.C. 192, ACT OF FEBRUARY 13, 1893, c. 105, § 3, 27 Stat. 445

Limitation of liability for errors of navigation, dangers of the sea and acts of God. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

SECTION 4 OF THE HARTER ACT, BEING 46 U.S.C. 193, ACT OF FEBRUARY 13, 1893, c. 105, § 4, 27 Stat. 445

BILLS OF LADING TO BE ISSUED; CONTENTS. It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity; stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *prima facie* evidence of the receipt of the merchandise therein described.

NATIONAL TRANSPORTATION POLICY, SEPTEMBER 18, 1940, BEING 49 U.S.C., PRECEDING SECTIONS 1, 301, 901, AND 1001

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States

and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Note:—The following constitutes the first paragraph of section 500 of the Transportation Act, 1920, approved February 28, 1920, *infra:*

> "Sec. 500. [U. S. Code, title 49, § 142.] It is declared to be the policy of Congress to promote, encourage, and develop water transportation, service and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

SECTION 1 OF PART I OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 1(4), ACT OF JUNE 18, 1910, § 7, c. 309, 36 Stat. 545, AS AMENDED FEBRUARY 28, 1920, c. 91, § 400, 41 Stat. 474; SEPTEMBER 18, 1940, c. 722, TITLE I, § 2(c), 54 Stat. 899

It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and

reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

SECTION 15 OF PART I OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C., SECTION 15(13), ACT OF FEBRUARY 4, 1887, c. 104, SECTION 15, 24 Stat. 384, AS ADDED JUNE 29, 1906, c. 3591, § 4, 34 Stat. 590; AS AMENDED JUNE 18, 1910, c. 309, § 12, 36 Stat. 553-554; FEBRUARY 28, 1920, c. 91, § 421, 41 Stat. 488; MARCH 4, 1927, c. 510, § 2, 44 Stat. 1447; AUGUST 9, 1935, c. 498, § 1, 49 Stat. 543; SEPTEMBER 18, 1940, c. 722, TITLE I, SECTION 10(a-d), 54 Stat. 911, 912.

If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumenality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this chapter and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the

same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

SECTION 20(11) OF PART I OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 20(11), ACT OF FEBRUARY 4, 1887, c. 104, PT. I, § 20, 24 Stat. 386; JUNE 29, 1906, c. 3591, § 7, 34 Stat. 593; MAR. 4, 1915, c. 176, § 1, 38 Stat. 1196; AUG. 9, 1916, c. 301, 39 Stat. 441; FEB. 28, 1920, c. 91, §§ 436-438, 41 Stat. 494; JULY 3, 1926, c. 761, 44 Stat. 835; MAR. 4, 1927, c. 510, § 3, 44 Stat. 1448; APR. 23, 1930, c. 208, 46 Stat. 251; AUG. 9, 1935, c. 498, § 1, 49 Stat. 543; SEPT. 18, 1940, c. 722, TITLE I, § 13(b), 54 Stat. 919.

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or

transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: * * *. [Omitting the provisions with regard to limitation on values of ship-

ments, notice and filing of claims, and the venue of suits for recovery of damages.]

SECTION 216 OF PART II OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 316(c), ACT OF FEBRUARY 4, 1887, c. 104, PART II, § 216, AS ADDED AUGUST 9, 1935, c. 498, 49 Stat. 558, AND AMENDED JUNE 29, 1938, c. 811, § 16, 52 Stat. 1240; SEPTEMBER 18, 1940, c. 722, TITLE I, § 22(b-d), 54 Stat. 924

Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

SECTION 225 OF PART II OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C., 324(a), ACT OF FEBRUARY 4, 1887, c. 104, PART II, § 225, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE I, § 26(a), 54 Stat. 928.

If the owner of property transported under this part directly or indirectly renders any service connected with

such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

SECTION 302(e) OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C., 902, ACT OF FEBRUARY 4, 1887, c. 104, PART III, § 302, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, § 201, 54 Stat. 929.

The term "contract carrier by water" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of "contract carrier by water". Whenever the Commission, upon its own motion or upon application of any interested

party, determines that the application of the preceding sentence to any person or class of persons is not necessary in order to effectuate the national transportation policy declared in this Act, it shall by order exempt such person or class of persons from the provisions of this part for such period of time as may be specified in such order. The Commission may by order revoke any such exemption whenever it shall find that the application of such sentence to the exempted person or class of persons is necessary in order to effectuate such national transportation policy. No such exemption shall be denied or revoked except after reasonable opportunity for hearing.

SECTION 305 OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 905(b), ACT OF FEBRUARY 4, 1887, c. 104, PART III, § 305, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, § 201, 54 Stat. 934

It shall be the duty of common carriers by water to establish reasonable through routes with other such carriers and with common carriers by railroad, for the transportation of persons or property, and just and reasonable rates, fares, charges, and classifications applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to their operation and providing for reasonable compensation to those entitled thereto. Common carriers by water may establish reasonable through routes and rates, fares, charges, and classifications applicable thereto with common carriers by motor vehicle. In the case of joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just, reasonable, and equitable divisions there-

of, which shall not unduly prefer or prejudice any of such carriers.

SECTIONS 306(a) AND 306(c) OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 906, ACT OF FEBRUARY 4, 1887, c. 104, PART III, § 306, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, § 201, 54 Stat. 935

(a) Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee.

* * * * *

(c) No common carrier by water shall charge or demand or collect or receive a greater or less or different compensation for transportation subject to this part

or for any service in connection therewith than the rates, fares, or charges specified for such transportation or such service in the tariffs lawfully in effect; and no such carrier shall refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation affecting the value thereof except such as are specified in its tariff: Provided, That the provisions of sections 1 (7) and 22 of part I (which relate to transportation free and at reduced rates), together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply to common carriers by water.

SECTION 314 OF PART III OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C. 914, ACT OF FEBRUARY 4, 1887, c. 104, PART III, SECTION 314, AS ADDED SEPTEMBER 18, 1940, c. 722, TITLE II, SECTION 201, 54 Stat. 945

If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefore shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

SECTION 415 OF PART IV OF THE INTERSTATE COMMERCE ACT, BEING 49 U.S.C., 1015, ACT OF FEBRUARY 4, 1887, c. 104, PART IV, § 415, AS ADDED MAY 16, 1942, c. 318, § 1, 56 Stat. 296

If the owner of property transported in service subject to this part directly or indirectly renders any service connected therewith, or furnishes any instrumentality used therein, the charge and the allowance therefor, to such owner, shall be published in tariffs filed in the manner provided in this part and shall be no more than is just and reasonable and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the freight forwarder or forwarders for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

PERTINENT ITEMS OF MISSISSIPPI VALLEY BARGE LINE COMPANY'S FREIGHT TARIFF 25-C, I.C.C. 101, EXHIBIT VALLEY 7, SENT TO THIS COURT IN THE ORIGINAL

[Explanatory note: This tariff consists of 117 printed pages of provisions and rates of Mississippi Valley Barge Line Company and its participating carriers (named on page 4 of the tariff), being Coyle Lines Incorporated, Dixie Carriers, Inc., Federal Barge Line, Inc., Gulf Canal Lines, Inc., and Hyer Towing Company, all of whom have published concurrences with the Interstate Commerce Commission. The cover, among other things, bears the legend "Freight Tariff 25-C (cancels Freight Tariff 25-B) naming local and joint all water commodity

rates in bargeloads and rates for transporting empty barges" between specified points. The only "towage" rates are for towing empty barges, computed on the basis of their top surface area and mean drafts, which will be found on page 96 of the tariff. The transportation rates for all commodities are published as affreightment rates, either "A", "B" or "C", the two former in barges furnished by the carriers and the "C" rate in barges furnished by the shippers. Item 680, hereinafter referred to, is the face of Valley's straight bill of lading, printed in its tariff at page 39. Item 690, hereinafter referred to, is the face of Valley's order bill of lading, printed in its tariff, page 40. Item 700, hereinafter referred to, is the back both of Valley's straight and of its order bills of lading, printed in its tariff, pages 41 and 42. Item 710, hereinafter referred to, is Valley's towing contract, printed in its tariff, page 43.]

Item 10

GENERAL APPLICATION OF RATES

(a) Except as otherwise provided, rates named herein apply f.o.b. barge at origin to f.o.b. barge at destination.

(b) All rates in this Tariff shown under columns headed by letters "A", "B" and "C", indicate application of such rates as follows:

Column "A" Rates—apply on shipments moving in barges furnished by Carrier, including full common carrier liability. (See Item 40)

Column "B" Rates—apply on shipments moving in barges furnished by Carrier, including only limited liability. (See Item 40)

Column "C" Rates—apply on shipments moving in

barges furnished by Customer, including only limited liability. (See Items 40, 490, 500 and 510)

* * * * *

Item 40

CARRIER'S LIABILITY

(a) **Column "A"** rates published in this Tariff are subject to the terms and conditions of Items 680, 690 and 700 of this Tariff, under which carriers assume liability for losses due to fire and marine risks and Acts of God, unless arising out of War or unless caused by authority of law as excepted in said items.

(b) **Columns "B" and "C"** rates published in this Tariff are subject to the terms and conditions of Items 680, 690 and 700 of this Tariff, under which carriers assume only limited liability.

* * * * *

Item 490

SHIPMENTS IN BARGES NOT SUPPLIED BY CARRIER

(a) Customer warrants that barges not owned or supplied by Carrier, loaded with shipments which Customer offers for transportation under "C" rates, are seaworthy and properly equipped and supplied and in all respects fit and suitable to be towed and that the shipment is properly stowed therein or thereon. Carrier reserves the right to refuse to accept any such barge if in its judgment the barge is unfit to be towed, and Carrier's determination of unfitness shall be conclusive. Carrier shall not be obligated to inspect barges supplied by Customer or the stowage of any shipment therein or thereon and Carrier shall not be liable for failure to

make such inspection; and such inspection, if made, shall not affect the warranties of the Customer as herein expressed.

(b) Carrier reserves the right, without liability therefor, to terminate the towage and/or tie off any barge supplied by Customer at any point should the barge become unfit to tow, and Carrier's determination of unfitness shall be conclusive. Thereafter, if Customer corrects such unfitness, Carrier will complete the towage of the barge to its original destination at the rate applicable from point of origin to such destination.

(c) Carrier will not be liable for charges and expenses of any nature that may accrue against barges supplied by Customer or shipments therein or thereon, except as otherwise may be provided herein.

Item 500

MOVEMENT OF EMPTY BARGES NOT SUPPLIED BY CARRIER IN CONNECTION WITH COLUMN "C" RATES

(a) When shipment is transported in barge furnished by Customer at Column "C" rates named herein, a return movement of the empty barge to point of origin (or some intermediate point) will be made without additional charge unless otherwise provided, if such empty barge is tendered to Carrier for return movement within one hundred eighty (180) days after delivery of the loaded barge at destination.

(b) An empty barge, which is owned or controlled by Customer, not exceeding the size of the barge used for the loaded movement may be forwarded under the provisions of this item in lieu of the barge used for the loaded movement, provided such empty barge is tendered to

carrier for movement prior to the fifth day after delivery of the loaded barge to its consigned destination.

(c) No charge will be made by Carrier for towing to point of loading an empty barge owned or controlled by Customer if such empty barge (or another barge of the same type and size) is loaded and tendered to carrier for line-haul movement to or beyond the point of origin of the empty barge within twenty (20) days after delivery to point of loading.

(d) Customer shall be entitled to only one free movement of an empty barge under (a), (b) and (c) hereof.

(e) Empty barges tendered for movement hereunder will be accepted only subject and pursuant to the provisions of the towage contract of Carrier set forth herein in Item 710.

Item 510

CARRIER'S LIABILITY FOR LOADED BARGES NOT SUPPLIED BY CARRIER IN CONNECTION WITH COLUMN "C" RATES

When cargo is transported in barges furnished by Customer, such barges will be handled only subject and pursuant to the provisions of Item 710.